

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
KNOXVILLE DIVISION**

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LEWIS COSBY, KENNETH R. MARTIN, as	:	No. 3:16-cv-121
beneficiary of the Kenneth Ray Martin Roth IRA,	:	
and MARTIN WEAKLEY on behalf of themselves	:	
and all others similarly situated,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
KPMG LLP,	:	
	:	
Defendant.	:	
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KPMG LLP’S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

KPMG LLP (“KPMG”) moves the Court, pursuant to Federal Rule of Civil Procedure 12(b)(6), to dismiss the Second Amended Class Action Complaint. *First*, the claims asserted under Section 10(b) of the Securities Exchange Act of 1934 (the “Exchange Act”) on behalf of purchasers of the common stock of Miller Energy Resources, Inc. (“Miller Energy” or the “Company”)—Counts One and Two—must be dismissed because: (1) Plaintiffs have not alleged facts giving rise to the “strong” inference of scienter required by the Private Securities Litigation Reform Act (the “PSLRA”), 15 U.S.C. §78u4(b)(3)(A), (2) Plaintiffs have not pleaded loss causation, and (3) the claims, filed more than two years after discovery of the relevant facts, are time-barred. Also, Count One fails because Plaintiffs have not pleaded an actionable misstatement of opinion under *Omnicare, Inc. v. Laborers District Counsel Construction Industry Pension Fund*, 135 S. Ct. 1318 (2015), and Count Two fails because Plaintiffs have not

alleged an actionable “scheme” under *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2007).

Second, the claim asserted under Section 11 of the Securities Act of 1933 (the “Securities Act”) by a new plaintiff (Martin Weakley) on behalf of a proposed class of preferred stock purchasers—Count Three—also must be dismissed. First, Mr. Weakley did not apply to serve as lead plaintiff and is not authorized to assert claims on behalf of preferred shareholders; the plaintiffs in *Gaynor v. Miller* were appointed lead plaintiffs to represent these shareholders. Second, as the preferred shares at issue were *bona fide* offered more than three years prior to the filing of the complaint, the claim is barred by the three-year statute of repose. Third, as Plaintiffs had notice of the claim more than one year prior to asserting it, the claim is barred by the one-year statute of limitations. Fourth, the claim is not viable under *Omnicare*.

KPMG further relies on its Memorandum of Law and the Declaration of Tera Rica Murdock, with accompanying exhibits, each of which is filed contemporaneously herewith.

KPMG requests that the Court grant its motion to dismiss. Because Plaintiffs have already amended their complaint twice, and because the grounds for dismissal are insurmountable, KPMG request that dismissal be with prejudice.

Dated: October 20, 2017

Respectfully submitted,

s/ Paul S. Davidson

Paul S. Davidson (TN BPR # 011789)

Tera Rica Murdock (TN BPR #028153)

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CERTIFICATE OF SERVICE

I hereby certify that on October 20, 2017, a copy of the foregoing was filed electronically and served via the Court's CM/ECF system on the following:

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